UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

SATCO, INC. D/B/A SATCO CORPORATION

Employer [1]/

Case 9-RC-17669

INDUSTRIAL WORKERS OF THE WORLD --
METAL AND MACHINERY WORKERS INDUSTRIAL
UNION LOCAL 440

Petitioner [2]/

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Employer, Satco, Inc. d/b/a Satco Corporation Hospital, is engaged in the business of manufacturing containers for the airfreight industry at a facility in Louisville, Kentucky where it employs approximately 26 production and maintenance employees and truck drivers. The Petitioner, Industrial Workers of the World - Metal and Machinery Workers Industrial Union 440, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of all non-management/non-supervisory employees at the facility. A hearing officer of the Board held a hearing and the parties filed briefs with me.

As evidenced at the hearing and in the briefs, the parties disagree on the threshold issue of whether the Petitioner is a labor organization within the meaning of the Act or is otherwise qualified to represent any of the Employer's employees. The Parties further disagree on the following issues involved with the placement of employees within an appropriate bargaining unit: (1) Whether three working foremen are statutory supervisors who should be excluded from the unit; (2) Whether the parts person has such a community of interest with other bargaining unit employees that he must be included in the unit. Finally, although the parties stipulated that two individuals (Robert Duvall and Lora Kinberger) should be excluded from the unit, they did not articulate on what basis they should be excluded and therefore the appropriateness of their exclusion must also be addressed.

At the hearing in this matter, the Employer declined to stipulate that the Petitioner is a labor organization within the meaning of the Act. It argues that certain language in the preamble to the Petitioner's constitution -- including language never placed in the

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[1]/ The name of the Employer appears as amended at hearing.

[2]/ The name of the Petitioner appears as amended at hearing.

record -- indicates that the Petitioner is not interested so much in engaging in collective bargaining as changing the status quo of our capitalistic economic system. It further asserts -- again in part relying upon evidence never placed in the record -- that the local union has an insufficient structure to warrant the conclusion that it is a labor organization. I have considered the evidence and arguments and conclude that the Petitioner is a labor organization within the meaning of the Act and its views on what might constitute an ideal economic system do not disqualify it from being certified as a bargaining representative.

With respect to the unit placement issues: The Petitioner contends that the Employer's three working foremen (Greg Edwards, Wilmer Rivera and Jose Don Brown) must be excluded because they are statutory supervisors. The Employer contends that they are not supervisors. As discussed below, I have concluded that they are not statutory supervisors and should be included in the unit.

The Petitioner further contends, contrary to the Employer, that the parts person (Andy Castellon) should be excluded because he does not have such a community of interest with other unit employees that an appropriate unit must include him. I have concluded that not only does this individual share such an overwhelming community of interest with the other employees that he must be included in the unit, but that if he were not included there would be no other bargaining unit which might possibly include him, thus depriving him of any chance for representation.

Finally, the parties stipulated that one office worker (Lora Kinberger) and the location manager (Robert Duvall [3]/) should be excluded from the unit, but offered no rationale for doing so. I have concluded that Kinberger may be appropriately excluded as an office clerical and that Duvall is appropriately excluded as a statutory supervisor.

Accordingly, I have directed an election in an approximately 26-person unit consisting of the Employer's production and maintenance employees, as well as its truck drivers, and including the working foremen and the parts person.

Because the resolution of any of the other issues involved in this case would be unnecessary were I to conclude that the Petitioner is not a labor organization within the meaning of the Act or should not otherwise be allowed to act as the unit's bargaining representative, I will begin with that issue. I will then describe the Employer's operations and deal with each unit issue in turn.

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[3]/ Duvall also frequently appears in the record in this matter as "Duball." I will refer to him herein as "Duvall" since that is how he is referred to in the brief submitted to me by the Employer.

I. LABOR ORGANIZATION STATUS

A determination of the issue involved with the Employer's calling into question the Petitioner's status as a labor organization involves the resolution of "two somewhat related but distinctly separate concepts. The first is the existence of a group or entity as a labor organization; the second is that organization's capacity or qualification to act as a bargaining representative." *Sav-On Drugs, Inc.,* 243 NLRB 859 (1979).

I will, therefore, consider each concept separately. In considering this issue, however, I begin with the fact that the record reflects that the Petitioner currently represents employees for purposes of collective bargaining at a few locations around the nation. I further note that the Board has on at least one occasion ordered an employer to recognize and bargain with Petitioner, including with the specific local involved here. See, *Mid America Machinery Company*, 238 NLRB 537 (1978).

A. The Question of the Existence of a Group or Entity Comprising a Labor Organization

As to the first concept: Section 2(5) of the Act provides that "the term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." It is clear that the Petitioner meets each of the criteria of Section 2(5) of the Act for the following reasons.

With respect to whether the Petitioner comprises an organization: Although the precise structure of its organization is somewhat unclear, it is clear from the evidence before me that the Industrial Workers of the World (IWW) admits employees to membership, has a constitution, has a procedure providing for constitutional amendments, has officers, has a procedure for recalling officers and pays taxes. While the Employer makes the bare faced assertion that Metal and Machinery Workers Industrial Union 440 (IU 440) does not have any by-laws, locally operates out of the home of its Louisville agent and has not filed forms or reports with the Department of Labor, there is nothing in the record to support these assertions. [4]/ Even were these assertions with respect to IU 440 supported by the record, they would not necessarily detract from a finding that IU 440 constitutes a labor organization within the meaning of

[4]/ In this regard, even when the Employer cites to the record on this issue it draws conclusions not reflected therein. For example, it asserts in its brief that the local does not have any officials other than the president of the IWW. The position referred to in the record is the Secretary Treasurer. Moreover, the record does not describe the office as the only position, but rather as the only one held by a *paid* employee of the union.

the Act. [5]/ In any event, that issue is not before me since IU 440 has not petitioned to separately represent the unit involved in this matter, but as a part of the IWW which easily passes muster as a labor organization.

With respect to participation of employees in the organization: Not only do employee/members vote on union officers and contracts but the Petitioner appears to place a particularly keen emphasis on empowering rank and file employees to participate in the life of the organization. For example, a group of 15 employee/ members may bring any issue before the entire organization. The Petitioner also strives to enable employees to manage their own affairs at each location where it represents them. Thus, the Petitioner emphasizes training of employees within a shop with the goal that employees within a given bargaining unit manage their own representational matters. It is therefore clear that employees participate within the organization that comprises the Petitioner.

With respect to the purpose for which the Petitioner exists: It is manifestly apparent that the Petitioner exists, at least in part, to negotiate contracts and to handle grievances concerning conditions of work because it has done so with other employers. [6]/

B. <u>The Petitioner's Capacity or Qualification to Act as a Bargaining Representative</u>

As to the second concept: The Employer established at the hearing in this matter that the preamble to the Petitioner's constitution sets forth the following : "A fair day's wage for a fair day's work. We must inscribe on our banner the revolutionary watch word abolition, abolition, of the wage system". Moreover, at the beginning of the preamble to the constitution is found the statement, "To take possession of the means of production and abolish the wage system." [7]/ The Petitioner explains that what is

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[5]/ Despite the lack of structural formality manifested by the absence of a constitution or bylaws and by the failure to collect dues or initiation fees, an organization which admitted employees to membership, was established for the purpose of representing its membership, and intended to do so if certified was found to be a labor organization in *Butler Mfg*. *Co*., 167 NLRB 308 (1967). See also, *Yale University*, 184 NLRB 860 (1970); *Stewart-Warner Corp*., 123 NLRB 447 (1959). See also, *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959).

[6]/ The Employer notes that the Petitioner has no collective bargaining agreements in the Louisville area. However, the record reflects that the IWW represents employees in a number of locations and the Employer offers no precedent for requiring an entity to have established itself in a particular locale before it may be considered a labor organization for the purpose of representing employees in that geographic area.

[7]/ The Employer cites what is apparently the entire preamble to the IWW constitution in its brief. Since the Employer did not make the entire preamble a part of the record, I will consider only that portion set forth in the record and which is quoted above.

espoused by this prefatory language is "economic democracy;" i.e., "that if someone works for something and earns it, that they are the recipients of that; that decisions are made in consultation with all people concerned in the work place."

The Employer argues that it is clear from the IWW constitution that it espouses Communist principles and seeks the overthrow of the capitalist wage system. I note, however, that the quoted language is in the preamble rather than in the body of the constitution -- the body presumably setting forth how the organization is to actually conduct its day-to-day affairs. The Petitioner is certainly free to express a philosophical view that the capitalistic system, as it traditionally operates, is less than an ideal one. So long as the Petitioner adheres to the precepts of collective bargaining within the system as it exists and obeys the laws of the land as they exist -- and there is no indication in the record before me that it has acted other than within these parameters -- its views on what a utopian scheme of economic activity would consist of do not disqualify it from acting as employees' collective-bargaining representative. [8]/

In sum, I find that the Petitioner is a labor organization within the meaning of the Act and there is no evidence before me indicating that it is otherwise disqualified from acting as the collective bargaining agent for the unit of employees in which I am directing an election. [9]/

II. OVERVIEW OF OPERATIONS

The Employer's operations are headquartered in California. In addition to the Louisville, Kentucky facility involved in this proceeding, it maintains operations in Edison, New Jersey; Indianapolis, Indiana; and Memphis, Tennessee. As will become more apparent, the Louisville operations are closely overseen by a vice-president of the Employer located at the Memphis facility to whom the manager of the Louisville operation reports.

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[8]/ I note that Section 9(h) of the National Labor Relations Act, which had provided that labor unions could not secure Board investigation of employee representation or the issuance of a complaint unless there was on file with the Board so-called non-Communist affidavits of each officer of the union and its parent organization, was repealed in 1959 by Pub.L. 86-257, Sec. 201(d). In addition, Section 504 of the Labor Management Relations Act [29 U.S.C.A. Sec. 504] -- which made it a crime for a member of Communist Party to serve as officer or employee of labor union -- was declared unconstitutional by the Supreme Court in *United States v. Brown*, 381 U.S. 437, 85 S.Ct. 1707, 14 L.Ed.2d 484 (1965).

[9]/ The Employer's reliance on, *Harrah's Marina Hotel*, 269 NLRB 1007 (1983) is misplaced. Here, unlike the situation in *Harrah's,* there is no evidence that Petitioner has acted illegally and, in fact, employees are allowed and encouraged to participate fully in the administration of the Union.

The Louisville operation builds and repairs large containers utilized by United Parcel Service (UPS) to hold packages shipped by airplane. The Louisville facility consists of a building with an enclosed center area; which lower level contains offices in the front and a conference room and bathrooms in the back, and which upper level comprises a breakroom. There are two production areas attached to and accessible from the office area. On the right side are the repair operations and on the left side new containers are constructed. To the rear of the facility is a parking lot.

The bulk of the Employer's workforce carries the classification of "mechanic." There are four mechanics working on the new construction side of the facility -- which currently comprises only a small part of the Employer's Louisville operations -- and 18 mechanics on its repair side. Other employee classifications include welders, inspectors, a parts person, truck drivers and three working foremen.

Apparently the Employer's construction of new containers is a relatively recent undertaking at the Louisville facility. The four mechanics in the new construction area of the facility work in conjunction with a working foreman to build a container from the ground up. It is unclear whether this is done in an assembly line fashion or whether they all work together in a single group.

The repair side consists of an assembly line type operation with various workstations. Containers in need of repair are trucked to the facility and moved to a holding area on rollers. There, two inspectors check the work which needs to be performed on the containers. These individuals will memorialize the needed repairs on a work order that is placed in a pouch on the container. The container then begins a trip down what is referred to as "container highway." This is an assembly line type system where employees working in pairs at various workstations do different sorts of repairs.

Once the repair work is completed on a container it must pass inspection by someone who verifies that it is in compliance with Federal Aviation Authority (FAA) air-worthiness standards. There are only three individuals working at the Employer's Louisville facility certified by the FAA to perform these final inspections -- Manager Robert Duvall and working foremen Wilmer Rivera and Jose Don Brown -- although they may be assisted in this final inspection by two non-certified employees.

Following their inspection, the containers are trucked back to UPS; which is situated approximately 15 minutes from the Employer's facility. The trucks are ordinarily driven by one of two individuals classified as a driver and possessing a commercial drives license (CDL) or by the working foreman over the truck drivers. [10]/ Often, however, another classification of employee will ride along with the driver to help with the off-loading of the containers. In addition, two production employees have CDLs and are called upon on occasion to drive trucks.

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[10]/ While there is currently only one truck driver in addition to Edwards, there are ordinarily two.

With respect to non-production/non-truck driver employees: The facility is overseen by Manager Robert Duvall who maintains an office in the front office area. Also working in this area is Lora Kinberger, who apparently is the administrative secretary.

All individuals working at the facility -- including those whose placement in the unit is in issue -- share the same benefits such as paid sick days, bereavement pay, two weeks vacation after one year of employment, medical insurance and the option of participation in a 401(k) plan. There is a common breakroom utilized by all.

Duvall apparently does not record his hours. Everyone else at the facility must sign in to record his or her hours of work. The employees in issue, (working foremen and parts person), however, sign a different sheet kept in the office area rather than the sheet maintained for other employees. All employees, including those in issue, are hourly paid and receive overtime for any hours worked beyond a normal 8-hour day. The standard workday for all employees at the facility is 7:30 a.m. to 4:00 p.m.

III. THE WORKING FOREMEN

Before examining the specific duties and authority of the working foremen, I will briefly review the requirements for establishing supervisory status. Section 2(11) of the Act defines the term supervisor as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." To meet this definition, a person needs to possess only one of the 12 specific criteria listed, or the authority to effectively recommend such action. *Ohio Power Co. v. NLRB*, 176 F. 2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgement. *Harborside Healthcare, Inc.,* 330 NLRB 1334 (2000).

The burden of proving supervisory status lies with the party asserting that such status exists. *Kentucky River Community Care, Inc.,* 532 U.S. 706, 711-712 (2001); *Michigan Masonic Home*, 332 NLRB No. 150, slip. op. at 1 (2000). The Board has frequently warned against construing supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. See, e.g., *Vencor Hospital – Los Angeles*, 328 NLRB 1136, 1138 (1999); *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1114 (1997). Lack of evidence is construed against the party asserting supervisory status. *Michigan Masonic Home*, supra, slip op. at 1. Mere inferences or conclusionary statements without detailed, specific evidence of independent judgment are insufficient to establish supervisory authority. *Sears, Roebuck & Co*., 304 NLRB 193 (1991).

Possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status even if this authority has not yet been

exercised. See, e.g., *Pepsi-Cola Co.,* 327 NLRB 1062, 1063 (1999); *Fred Meyer Alaska*, 334 NLRB No. 34, slip op. at 4 n. 8 (2001). The absence of evidence that such authority has been exercised may, however, be probative of whether such authority exists. See *Michigan Masonic Home*, supra, slip op. at 3; *Chevron U.S.A*, 308 NLRB 59, 61 (1992).

A. <u>An Overview</u>

Ryan Gregory Edwards is the working foreman over the truck drivers. He is responsible to see that the trucks are adequately maintained (primarily through an outside source); will himself drive a truck an estimated 3 to 5 hours a day; and, because of his unique skills, will direct and assist with certain types of plant maintenance, such as the installation of railings. He will attempt to assure deliveries are timely made. Drivers do not report in with him nor does he assign them deliveries, which are pre-set.

Wilmer Rivera and Jose Don Brown are the two working foremen over production employees. They assure that work moves along efficiently in the shop, is appropriately completed and that the containers meet FAA standards. Both men perform mechanics' or welders' work.

All 3 individuals work under the direction of the local manager, Robert Duvall. Duvall conducts the Louisville operations in close consultation with Vice-President Mike Proctor, who is located at the Employer's Memphis operations. Duvall estimates that he is in telephone communication with Proctor two or three times a day. Duvall is physically on the shop floor an estimated 2 hours per day.

Duvall does all the interviewing and hiring at the Louisville facility. He may have one of the working foremen sit in on the interviews, but he makes the final decisions and the working foremen's recommendations on whether to hire an applicant are not always followed.

A working foreman in the shop may on occasion transfer an employee from one workstation in the shop to another in order to help equalize the workload, but they would let Duvall know that they had made the adjustment. A working foreman in the shop, however, could not move a driver into the shop. Moreover, approval from Duvall is sought before transferring an employee from one workstation to another based upon an evaluation of skill. When Edwards, the driver working foreman, asks Rivera or Brown to lend him someone to ride with a driver, Duvall would be advised of the fact. Edwards does not assign drivers their work – they have a set run and a set quota.

Duvall must authorize any overtime. Employees are occasionally allowed to leave early with pay or a cookout may be held for them as a reward for a particularly productive day. While in general these may be suggested by the working foremen, they must be approved by Duvall. He does not always give his approval.

Working foremen may give oral warnings; but these do not appear to be of a formal nature, falling more into the category of a chewing out of an individual or a group for perceived shortcomings. There apparently are no formal records kept of such incidents and no set number will result in higher discipline. In general, any formal discipline to be placed in an employee's personnel file must be authorized by Duvall who, along with a working foreman and the employee, signs off on the document. A working foreman may ask that some record of discipline be placed in a file, but Duvall must approve it and has not always agreed with the foreman's recommendation. Duvall has on occasion located a warning in a personnel file which he had not approved. He has destroyed these. Suspensions must be authorized by Duvall, with the employee involved having the right to plead his/her case to Duvall. [11]/ If there is a dispute as to what occurred, Duvall may interview witnesses to the event with no one else present. Apparently if the situation is one that might be characterized as a safety issue, an employee may be suspended by a working foreman, but Duvall is to be told and okay the decision.

Duvall is the only individual with authority to fire an employee at the facility, but even he will consult with Proctor before he does so. It appears that the employee involved is also given the opportunity to speak with Proctor. The only incident involving a working foreman discharging an employee on his own appears to prove rather than disprove the rule. This situation began with an incident where Rivera was arguing with an employee. Rivera suspended the employee; felt the employee then threatened him and therefore fired the employee. When Duvall found out about the situation Duvall phoned the employee to tell him to return to work the next day. The suspension had taken place in the afternoon. When the employee returned to work, Duvall and the employee spoke with Proctor. The employee was kept on. Rivera was reprimanded for overstepping his authority.

Although employees may view the working foremen as individuals that they can come to with complaints, except for minor issues such as problems with tools, employees are referred on to Duvall. Moreover the company policies, which are posted in the break room and the work floor, state in part, "Please be advised that all Satco personnel are to bring all issues of concern to the local Manager. No employee is permitted to discuss any rumor with another employee, foreman or supervisor. All matters of concern must be brought to the local Manager."

Rivera and Brown wear blue uniform shirts and apparently at least Rivera's shirt has the word "supervisor" on it. Edwards does not wear such a shirt. The only other individuals wearing such shirts are Duvall and parts person Castellon. Rivera and Brown each have a desk in the office area. It appears that they use these, at least in

[11]/ One witness for the Petitioner described a situation where he was asked by Rivera to sign a written reprimand that had not been signed by Duvall. He was, however, told to take it to Duvall for his signature also.

part, to complete paper work associated with the FAA mandated approvals of the containers

All three working foremen are hourly paid and receive overtime for work in excess of an 8-hour day. Most employees earn $12.42 per hour. The welders earn $13.84 per hour. Parts Person Castellon earns $14.00 per hour. Edwards earns $16.00 per hour and Rivera and Brown earn $16.56 per hour.

Edwards, Rivera and Brown have keys to the shop. Rivera apparently is usually the first to arrive and opens the shop. Also Rivera or Brown may be called upon to come to the shop off hours if the security alarm goes off. It is unclear what use Edwards makes of his key.

Duvall holds regular meetings with the three working foremen. These are held to assure things are running smoothly and to advise the foremen of production goals. A common topic raised by working foremen at these meetings involves perceived inadequate manning of the facility.

Duvall is rarely gone from the Louisville facility and a two or three day absence when he was stranded due to the World Trade Center disaster's effect on airline travel is the longest time period he has been gone from the facility to date. Rivera is the most senior employee at the facility and has never known Duvall to take a vacation. In cases of short-term absences, since he is the most senior working foreman, Rivera is left in charge. Duvall testified that if he were gone for more than a day or two, Proctor would either transfer someone else in to run the facility or give some limited responsibility to Rivera. Rivera reports that when he has been left in charge for the day he will call Proctor with any problems and if he wanted to do something such as let an employee go home early, he would check with Proctor.

B. Analysis and Resolution of Supervisory Issues

In beginning my consideration of whether the working foremen possess any of the supervisory authority set forth in Section 2(11) of the Act, I note that in enacting Section 2(11) of the Act, Congress emphasized its intention that only supervisory personnel vested with "genuine management prerogatives" should be considered supervisors, and not "straw bosses, leadmen, set-up men and other minor supervisory employees." *Chicago Metallic Corp.,* 273 NLRB 1677, 1688 (1985). I conclude that the three working foremen in issue here are precisely the sort of individuals that Congress did not wish to exclude from coverage by the Act.

I am aware that at least the shirt of Rivera may carry the word "supervisor" on it. It has long been held, however, that it is the independent exercise of any of the indicia of supervisory authority found in Section 2(11) off the Act that is controlling and not labels or titles -- these even having been described as "unimportant" or "irrelevant." *First Western Building Services*, 309 NLRB 591, 603 (1992). See also, *Aztec Bus Lines*, 289 NLRB 1021, 1051 (1988); *Tecom, Inc.*, 277 NLRB 294 fn., 5 (1985); *Columbia Engineers International*, 249 NLRB 1023, fn. 11 (1980).

1. Consideration of Supervisory Indicia

The record is silent with respect to the possession of certain Section 2(11) supervisory indicia by the working foremen, such as the ability to lay off, recall, or promote employees. Further, the working foremen have no ability to independently hire, discharge, or reward employees. Nor is there any evidence that they may adjust any grievances of import. This leaves only for consideration whether they have the authority to discipline employees, including by suspension; to transfer, assign or responsibly direct employees; or to effectively recommend any of the foregoing.

With respect to the discipline of employees: While the working foremen may independently give informal verbal warnings to employees, these are merely in the nature of admonishments with no memorialization of their ever having been given. The authority to caution employees about their conduct in such a manner is not considered to be discipline and does not establish supervisory authority. See, e.g., *Alois Box, Co.,* 326 NLRB 1177, 1178 (1998); *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1077 (1985). Moreover, the ability to give warnings which themselves have no adverse impact on an employee's employment status are not considered indicative of supervisory status. See, e.g., *Heritage Hall, E.P.I. Corp*., 333 NLRB No. 63, at slip. op. 2 (2001); *Ken-Crest Services*, 335 NLRB No. 63, at slip op. 2 (2001). Any discipline a working foreman may wish to give that has some lasting effect must be filtered through the judgement of Duvall or Proctor and the working foremen's recommendations to them in this regard are not always followed. [12]/

With respect to the transfer, direction and assignment of employees: While the working foremen to some extent may direct employees' work and have a very limited authority to move employees between workstations, it appears that the work is routine in nature requiring little, if any, direction. Such routine direction and assignment of employees is not considered indicative of true supervisory authority. See,. e.g., *Sears Roebuck & Co.,* 292 NLRB 753, 754-55 (1989).

2. Secondary Supervisory Indicia

While certain facts, such as the wage differential; the working foremen's attendance at exclusive meetings with Duvall; Rivera and Brown's desks; and Rivera and Brown's shirts might be viewed as some indication of special status, such so called "secondary indicia" do not indicate supervisory status in the absence of evidence

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[12]/ While the Petitioner asserts in its brief that decisions on discipline stand until Duvall may reverse them, the only example of such a situation appearing in the record which might have any lasting effect involves when Rivera suspended and then attempted to discharge on his own authority. The record does not reflect whether the employee suffered any economic loss from being sent home early and the whole episode appears to have been an aberration from the method Duvall wants supervision to follow when discipline is to be imposed.

indicating the existence of any one of the primary indicia of such status found in Section 2(11) of the Act. *Chrome Deposit Corporation*, 323 NLRB 96, fn. 9 (1997); *North Jersey Newspapers Co*., 322 NLRB 394 (1966); *Billows Electric Supply*, 311 NLRB 878, fn.2 (1993)

While I realize that the ratio of supervisor to employee working at the facility is approximately 1 to 26, this again does warrant the conclusion that there must of necessity be other statutory supervisors on site. See, e.g., *Ken-Crest Services*, 335 NLRB No. 63, at slip op. 3 (2001). Indeed, the complete absence of a supervisor at the same location as bargaining unit employees does not result in the conclusion that someone must be a statutory supervisor if no one at the location posses Section 2(11) authority. See, *Training School at Vineland*, 332 NLRB No. 152 (2000) and cases cited therein.

3. Substitution for Statutory Supervision

While Rivera on occasion may cover for Duvall's absences, he apparently does not have the same independence as Duvall from Proctor's oversight when he does so. In any event, sporadic and isolated substitution for a statutory supervisor does not confer supervisory status. See, e.g., *Carlisle Engineered Products*, 330 NLRB 1359, 1361 (2000); *Latas De Aluminio Reynolds, Inc*., 276 NLRB 1313 (1985).

4. Conclusion

Based on the forgoing and the record as a whole, I find that Petitioner has failed to meet its burden of proof and accordingly, I conclude that the working foremen are merely "leadmen" or "straw bosses" who do not exercise any independent judgment with respect to Section 2(11) indicia. See, e.g., *Somerset Welding & Steel Co., Inc.*, 291 NLRB 913, 914 (1988); *Dura-Vent Corporation*, 257 NLRB 430, 431-32 (1981).

IV. UNIT PLACEMENT OF THE PARTS EMPLOYEE

A. An Overview

Andy Castellon is classified as a parts person. As the title would imply, he is responsible for assuring employees have enough parts to perform their work. He also monitors such general supplies as soap. When parts are needed, Castellon tells Duvall. Duvall then makes the determination as to whether the supplies should be ordered at that particular point in time and Duvall himself communicates with suppliers or corporate headquarters to obtain the parts.

Castellon apparently does not himself deliver the parts to employees -- instead he merely informs employees that needed parts have arrived. He has a small air conditioned enclosed area near the shop floor in which he carries out his parts related duties and in which he stores some items thought to be subject to pilferage.

Castellon started out in the Employer's operations as a helper, progressed to a mechanic and then was promoted to parts person. He had apparently been performing the parts duties while classified as a mechanic and in recognition of that function was given a title and a raise.

Castellon estimates that it takes him approximately 2 hours per day to perform his parts related duties. The remainder of the day he works as a fill in -- working at whatever job Duvall assigns him, including riding with the truck drivers to UPS.

Castellon, like Rivera and Brown, wears a blue shirt on which is printed "Andy" and "Parts." He also has a key to the building. This enables him to have access to the facility early or late in the workday, or over the weekend, to perform work such as receiving parts.

As noted above, Duvall holds regular meetings with the working foremen. Castellon is on occasion asked to attend those meetings if there is going to be a matter related to parts addressed.

B. <u>Applicable Principles and Conclusion</u>

Nothing in the Act requires that the unit for bargaining be the only appropriate unit, or the ultimate unit, or even the most appropriate unit. *Morand Bros. Beverage Co.,* 91 NLRB 409 (1950). The Act requires only that the unit be an appropriate unit for the purposes of collective bargaining. *National Cash Register Co.*, 166 NLRB 173 (1967). Moreover, in a representation proceeding the unit sought by the labor organization is always a relevant consideration. *Overnite Transportation Co.*, 322 NLRB 723 (1996); *The Lundy Packing Company, Inc.*, 314 NLRB 1042, 1043 (1994); *Dezcon, Inc.*, 295 NLRB 109 (1989). Whether an employee or group of employees must of necessity be included within a unit sought by a union involves the issue of whether the employee or employees have a sufficiently separate community of interest from the unit employees. See, e.g., *Sears, Roebuck & Co*., 319 NLRB 607 (1995). In analyzing community of interest, the Board considers such factors as functional integration; employee interchange and contact; similarity of skills, qualifications and work performed; common supervision and similarity in wages, hours, benefits and other terms and conditions of employment. *Armco, Inc.*, 271 NLRB 350 (1984); *Atlanta Hilton & Towers*, 273 NLRB 87, 89 (1984); *J.C. Penney Co.*, 328 NLRB 766 (1999).

In the instant case, Castellon's duties as parts person are highly integrated into the Employer's production process. He rose to his current position from a classification within the unit. He has frequent contact with unit employees -- indeed spending much of his workday actually performing their work with them. Thus it is clear he shares and utilizes many of the same skills as unit employees. Duvall supervises him along with the rest of the bargaining unit. His wages are similar to other unit employees and his other benefits are identical. He, therefore, shares an overwhelming community of interest with unit employees and must be included in the unit.

Even were I to conclude that for some reason Castellon's duties unique to his keeping track of parts, his uniform, his access to keys and an air conditioned work area, and his occasional attendance at meetings with Duvall and the working foremen warranted his exclusion from the unit, another consideration in this case is the apparent lack of any other employee who might comprise a separate bargaining unit with Castellon. Thus, were he not included in the unit he would be left without any possibility of union representation. This consideration is a further basis supporting his inclusion. See, *Vecellio & Grogan, Incorporated (Aviation Division),* 231 NLRB 136, 137 (1977); *Victor Industries Corporation of California*, 215 NLRB 48, 49 (1974). Moreover, even if there were another employee who combined with Castellon might conceivably comprise a residual unit, the Board is reluctant to leave a residual unit where the employees could be included in a larger group. See, *Huckleberry Youth Programs*, 326 NLRB 1271 (1998).

Based on the forgoing, I will include Andy Castellon in the unit in which I am directing an election.

V. AGREED EXCLUSIONS

At the hearing in this matter the parties agreed to exclude Robert Duvall and Lora Kinberger from any bargaining unit found appropriate. They did not, however, articulate any basis for these individuals being excluded. I agree with the parties that these two individuals should be excluded from the unit for the following reasons.

A. Robert Duvall

It is clear that Duvall posses many of the indicia set forth in Section 2(11) of the Act and hence he is a supervisor within the meaning of the Act. I, therefore, in agreement with the parties, will exclude him from the unit.

B. Lora Kinberger

Kinberger is apparently the administrative secretary. She works in the office area with Duvall. Kinberger handles the payroll, maintains personnel files, administers the employee medical insurance, purchases office supplies and inputs customer charges into the computer system.

The Board has stated, "Clericals whose principal functions and duties relate to the general office operations and are performed within the office itself are office clericals who do not have a close community of interest with a production unit." *Mitchellace, Inc.,* 314 NLRB 536, 537 (1994). From her duties, it appears that Kinberger is an office clerical employee. Since the Board generally excludes office clerical employees from overall production and maintenance units, I agree with the parties that Kinberger is appropriately excluded from the unit. *Hygeia Coca-Cola Bottling Co*., 192 NLRB 1127, 1129 (1971); *Westinghouse Electric Corp*., 118 NLRB 1043 (1957).

VI. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6*)* and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employee, including all mechanics, welders, inspectors, the parts person, and working foremen; and all truck drivers, including the working foreman; employed by the Employer at its Louisville, Kentucky facility; but excluding the administrative secretary, and all guards and supervisors as defined in the Act.

VII. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Industrial Workers of the World - Metal and Machinery Workers Industrial Union 440. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their status as such during the eligibility period, and the replacements of those economic strikers. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **July 24, 2002**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (513) 684-3946. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VIII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EDST on **July 31, 2002.** The request may **not** be filed by facsimile.

Dated at Cincinnati, Ohio this 17th day of July 2002.

/s/ Richard L. Ahearn

Richard L. Ahearn, Regional Director
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3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

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